

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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EUGENE C. HULL,

Plaintiff,

-v.-

No. 6:08-CV-050  
(TJM/DRH)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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**APPEARANCES:**

**OF COUNSEL:**

EUGENE C. HULL  
Plaintiff Pro se  
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Room #5  
Utica, New York 13501

HON. ANDREW BAXTER  
Acting United States Attorney for the  
Northern District of New York  
Attorney for Defendant  
26 Federal Plaza - Room 3904  
New York, New York 10278

SHEENA V. WILLIAMS-BARR  
Special Assistant United States Attorney

**DAVID R. HOMER  
U.S. MAGISTRATE JUDGE**

**REPORT-RECOMMENDATION AND ORDER<sup>1</sup>**

Plaintiff filed his complaint on January 14, 2008. Docket No. 1. The Administrative

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<sup>1</sup>This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(d). This matter has proceeded in accordance with General Order 18 of this Court, which sets forth the procedures to be followed in appealing a denial of Social Security benefits.

Record on Appeal was filed on March 26, 2008. Docket No. 9. Defendant's answer was filed on May 27, 2008. Docket No. 12. Plaintiff's brief was due to be filed and served on or before July 11, 2008. Plaintiff failed to file his brief. By order dated September 2, 2008, the Court directed plaintiff to file his brief on or before October 6, 2008. Docket No. 13. Plaintiff has not filed his brief.

It is now five months beyond the date that plaintiff's brief was due, and the plaintiff has not filed any further papers to support his claim. "[F]ailure by plaintiff to take action for four (4) months shall be presumptive evidence of lack of prosecution," for which dismissal is appropriate. N.D.N.Y.L.R. 41.2(a). Moreover, pursuant to this Court's General Order, the defendant's answer is considered as a motion for judgment on the pleadings. Failure to respond in opposition to a motion, "unless for good cause shown, [will] be deemed by the court as consent to the granting or denial of the motion, as the case may be." N.D.N.Y.L.R. 7.1(b)(3).

Therefore, the Court hereby orders plaintiff to file with the Court within thirty (30) days of the date of the service of this Order an affidavit that details the reasons why this action should not be dismissed for want of prosecution. If plaintiff fails to submit such affidavit within such time, or otherwise fails to show good cause why this case should not be dismissed, the file in this matter shall be transmitted to the assigned district court judge, together with a recommendation that this action be dismissed for failure to prosecute.

### **Conclusion**

**WHEREFORE**, it is hereby

**ORDERED** that plaintiff file an affidavit with the Court showing good cause why this


case should not be dismissed within **THIRTY (30) DAYS** of the date of the service of this Order, and it is further

**RECOMMENDED** that if no such affidavit is received by the Court by such date, or if plaintiff otherwise fails to show good cause why this case should not be dismissed, that this action be dismissed; and it is further

**ORDERED** that the Clerk serve a copy of this Order on the plaintiff by regular mail.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Small v. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: December 24, 2008  
Albany, New York

  
United States Magistrate Judge